No. 74-1459

Supreme Court, U. S.
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In The Supreme Court of The United States

OCTOBER TERM, 1974

SAN DIEGO BUILDING CONTRACTORS ASSOCIATION, *et al.*,

Appellants,

v.

CITY COUNCIL OF THE CITY OF SAN DIEGO,

Appellee.

MOTION TO DISMISS OR AFFIRM

JOHN W. WITT, City Attorney
THOMAS F. CALVERLEY,
Deputy City Attorney
City Administration Building
202 "C" Street
San Diego, California 92101
Telephone: (714) 236-6220

Attorneys for Appellee

Interim Printing & Mailing Company, 3191 Adams Avenue, San Diego, California 92116 – 283-7282

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MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the Supreme Court of California on the grounds that the decision rests on an adequate nonfederal basis and the appeal does not present a substantial federal question not previously decided by this Court.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal involves the validity of a municipal zoning ordinance enacted through the initiative process in a chartered city in the State of California. The ordinance was passed in November, 1972, in a city-wide election by a majority of the voters of the City of San Diego; 186,007 (63%) for the ordinance and 108,968 (36.9%) against it. The ordinance, which became effective in December, 1972, provides that the height of buildings to be constructed within a prescribed coastal zone of the City of San Diego shall not exceed 30 feet. [1]

B. THE PROCEEDINGS BELOW

Subsequent to the adoption of the ordinance, appellants instituted an action in state court challenging it on various grounds. After a hearing, the trial court granted appellants' motion for summary judgment, [2] concluding that both the provisions of the San Diego City Charter and the due process

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1/ Jurisdictional statement, Appendix A, p. A-2.

2/ Jurisdictional statement, Appendix C, pp. A39-47.

clause of the Fourteenth Amendment to the United States Consitution prohibit the enactment of a zoning ordinance through the initiative process. The trial court enjoined the City from enforcing the ordinance. The City appealed the decision to the Fourth District Court of Appeal, State of California.

In March, 1973, a writ of supersedeas was granted by the Fourth District Court of Appeal, which stayed the trial court's judgment until the Court of Appeal rendered its decision. On November 16, 1973, the Fourth District Court of Appeal unanimously reversed the trial court's decision. [3] The Court found that the San Diego City Charter clearly allows the people to enact a zoning ordinance through the initiative process and the initiative process employed by The City of San Diego does not violate due process of law.

The appellants herein filed for a petition for hearing in the Supreme Court of California, which was granted. Amicus curiae briefs in support of The City of San Diego were filed by the Attorney General of the State of California, the City Attorney of Laguna Beach and a group entitled, "The Citizens

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3/ Jurisdictional statement, Appendix B, pp. A26-28.

for the preservation of the Initiative Power." Argument was heard on April 4, 1974, and the decision of the Supreme Court supporting the decision of the Fourth District Court of Appeal was rendered on December 26, 1974. [4]

II

ARGUMENT

A. THE CASE RESTS ON AN ADEQUATE NONFEDERAL BASIS

The City ordinance in issue was adopted in accordance with the initiative procedures set forth in the San Diego City Charter and Elections Code, procedures authorized by Article XI, Section 5 of the California State Constitution. All parties agreed in the proceedings below that these proscribed initiative procedures were complied with in full.

In California height limitations are valid. (*Sneed v. Riverside*, 218 Cal.App.2d 205, 32 Cal.Rptr. 318 (1963); *Brougher v. Board of Public Works*, 107 Cal.App. 15, 24, 290 P. 140 [1930].) Furthermore, California cities are granted the police power to enact zoning ordinances which are purely legislative acts.

4/ Jurisdictional statement, Appendix A, pp. A1-16.

(*Tandy v. City of Oakland*, 208 Cal.App.2d 609, 611 [1962].) In the City of San Diego the legislative power is divided between the City Council and the people by way of the initiative process. The San Diego City Charter establishes the right of the people to initiate ordinances on *all* legislative matters, and makes no exception for zoning ordinances.

The Supreme Court of California and the Fourth District Court of Appeal agreed that the initiative procedures employed by The City of San Diego in enacting legislation satisfied state constitutional requirements. It was undisputed that the proponents of the Coastal Zone Initiative Ordinance properly followed all the procedural requirements contained in the San Diego Municipal Code.

The Supreme Court of California has examined the question of whether the ordinance in issue has satisfied state constitutional procedures as far as method of enactment and content. The electorate of the City of San Diego has properly exercised its power to legislate pursuant to the provisions of the State Constitution and San Diego City Charter.

B. THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

Since the unanimous decision of *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915), the due process principles that govern the instant case have been stated. There is no necessity for a formal notice and hearing in the passage of general legislation. (*Bragg v. Weaver*, 251 U.S. 57 (1919); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 [1944].) Only where there is a small number of persons who are exceptionally affected does the formal notice and hearing procedure come into focus. [5] Then the governmental action becomes quasi-judicial or adjudicatory. Appellants cite cases in support of their position which are not factually analogous to the present case. [6]

5/ Compare *Londoner v. Denver*, 210 U.S. 373 (1908) with *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915). See Davis, Administrative Law, Text §§ 704, 706 (West Publ. Co. 1959.

6/ Both *Seattle Trust Co. v. Roberge*, 278 U.S. 116 (1928) and *Eubank v. City of Richmond*, 226 U.S. 137 (1912) turned on threatened delegation of regulatory power to persons directly interested in such regulation. The initiative ordinance in San Diego was open to *all* the registered voters. There was no danger of persons directly interested from acting from purely selfish motives and there was no "delegation of legislative authority."

The San Diego Coastal Zone Initiative Ordinance is unquestionably a general legislative act. The California and United States Supreme Court decisions do not require that every individual property owner be given an opportunity to be heard prior to the enactment of zoning legislation of general applicability. Rather, a procedure which is reasonably calculated to inform the decision-making body of the general facts and policies upon which the decision is to be made satisfies the requirements of fundamental fairness. These principles have been firmly established and have been followed in other state court decisions. (*City of Coral Gables v. Carmichael*, 256 So.2d 404 (1972); *Blankenship v. City of Richmond*, 188 Va. 97, 49 S.E.2d 321 (1948); 5 McQuillin, Municipal Corporations (3d ed. 1969) Sections 16.54 and 16.55, pp. 208-215.)

Appellants have throughout these proceedings confused the question of the validity of an initiative procedure with the substantive validity of the initiative ordinance enacted. The cases cited by the appellants are factually inapplicable to the

facts in this case. The electoral process itself provides both notice and opportunity to be heard to all electors, by written argument or otherwise. Appellants, as voters, obviously were aware of and directly participated in the City-wide election of November, 1972, and at all times were well informed. The challenge to the ordinance is on the grounds that the people enacted the ordinance directly through the initiative process rather than through their elected representatives on the City Council. However, in the City of San Diego, the legislative power is divided between the City Council and the people, with both having the power to enact legislation. So long as the legislative determination does not ignore constitutional restraints and violate fundamental rights, it is absolute. (*James v. Valtierra*, 402 U.S. 137 [1971].) The Supreme Court of California has examined these procedures and found them consistent with the State and Federal Constitutions in every respect. The San Diego Coastal Zone Initiative Ordinance is a valid product of democratic government in its purest form.

CONCLUSION

Wherefore, appellee respectfully submits that the questions upon which this cause depend have been decided on an adequate nonfederal ground and the case presents no substantial federal question not previously decided by this Court. Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of California.

Respectfully submitted,

JOHN W. WITT
City Attorney

THOMAS F. CALVERLEY
Deputy City Attorney

Attorneys for Appellee